

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)

U.S. Army, (b) (6))

Headquarters and Headquarters Company, U.S. Army)

Garrison, Joint Base Myer-Henderson Hall, Fort Myer,)

VA 22211)

**RULING: DEFENSE MOTION:
NON-EX PARTE
FILING BY GOVERNMENT**

29 May 2012

On 18 May 2012, the Government made disclosures to the Court and provided notice of its intent to file *ex parte* motions for the Court to conduct an *in camera* review and authorize a substitution of the classified DIA Information Review Task Force (IRT) Final Report and a substitution for the classified WikiLeaks Task Force report. The Government filed the *ex parte* motions with the Court. On 22 May 2012, the Defense Moved the Court to require the Government to file a non-*ex parte* version of its affidavit IAW MRE 505(g)(2) and MRE 505(i)(4)(A). On 28 May 12, the Government filed an opposing response. On 29 May 2012, the Defense filed a Reply. After considering the pleadings, evidence presented, and argument of counsel, the Court finds and concludes the following:

1. MRE 505(g) (*Disclosure of Classified Information to the Accused*) provides procedures when the Government agrees to voluntarily disclose classified information to the Defense.

2. MRE 505(g)(2) (*Limited Disclosure*) mandates that the Military Judge, upon motion of the Government, shall authorize:

a) Deletion of specific items of classified information from documents to be made available to an accused;

b) Substitution of a portion or summary of the information for such documents; or

c) Substitution of a statement admitting relevant facts;

unless the Military Judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial. The Government's motion and any materials submitted in support thereof shall, upon request of the Government, be considered by the Military Judge *in camera* and shall not be disclosed to the accused.

3. Defense cites the Navy-Marine Court of Military Review's decision in *U.S. v. Lonetree*, 31 M.J. 849 (N-M-C.M.R. 1990), *aff'd* 35 M.J. 396 (C.M.A. 1992) for the proposition that *in camera* review for substitutions under MRE 505(g)(2) are controlled by the procedures outlined in MRE 505(i). *Lonetree*, 31 M.J. at 857.

4. MRE 505(g)(2) provides specified procedures when the Government voluntarily discloses classified information but seeks a *limited* disclosure of that information to the Defense. The Government is not required to make a claim of privilege prior to making an motion for limited disclosure IAW MRE 505(g)(2). Nothing in MRE 505(g)(2) states that an *in camera* proceeding under MRE 505(i) is required

for a voluntary limited disclosure of classified information by the Government. Other provisions of MRE 505 identify when *in camera* proceedings under MRE 505(i) apply. See MRE 505(f) (MRE 505(i) applies when the Government has invoked a claim of privilege under MRE 505(c)), MRE 505(g)(3)(B) (invoking MRE 505(i) where a privilege has been invoked under RCM 914), and MRE 505(h)(4) (prohibiting the Defense from disclosing classified information until the Government has been afforded a reasonable opportunity to seek a determination under MRE 505(i)).

5. MRE 505(g)(2) is derived from Section 4 of the Classified Information Procedures Act (CIPA). See MCM, MRE 505(g)(2) analysis, A22-24. Federal courts interpret Section 4 of the CIPA as authorizing the Government to provide *ex parte* filings to the Court for limited disclosure without invoking a claim of privilege. See *U.S. v. Mejia*, 448 F.3d 436, 457 (D.C. Cir. 2006).

6. MRE 505(i) does not apply to voluntary limited disclosure by the Government of classified information. The procedures of MRE 505(g)(2) apply. To the extent the Navy – Marine Court of Criminal Appeals in *Lonetree* states otherwise, the Court disagrees.

7. The 18 May 2012 Prosecution Disclosure to the Court provides the Defense and the public with notice of what *in camera* motions the Government intends to file. In order to ensure the Defense and the public have notice of the general nature of the proposed substitutions proposed by the Government and the national security interest the Government seeks to protect with the substitutions, the Government shall file an unclassified redacted version of its *ex parte* motions. The Government is not required to submit the proposed substitutions to the Defense.

8. On 14 February 2012, Defense filed an *ex parte* supplement for the Court to consider in ruling on the Defense Motion to Compel Discovery (AE IX). On 15 March 2012, the Court ruled it would not consider the *ex parte* supplement when deciding the Defense Motion to Compel Discovery but that the Court would consider the *ex parte* supplement at the request of the Defense when conducting *in camera* reviews IAW MRE 505.

9. Defense will advise the Court by 1 June 2012 if the Defense desires the Court to consider the *ex parte* supplement when conducting the MRE 505(g)(2) *in camera* reviews requested by the Government.

RULING:

1. The Defense motion to require the Government to submit non-*ex parte* affidavits is **GRANTED IN PART**. The Government will provide the Court and the Defense with an unclassified redacted version of its *ex-parte* motion NLT 30 May 2012 that describes the general nature of the proposed substitutions and the national security interest the Government seeks to protect with the substitutions.

2. Defense will advise the Court NLT 1 June 2012 if the Defense requests the Court to consider the *ex parte* supplement when conducting the MRE 505(g)(2) *in camera* reviews.

ORDERED: This 29th day of May 2012.



DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit